INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Federal rule of criminal procedure	2
Statement	3
Argument	4
Conclusion	8

CITATIONS

Cases:	
Cephus v. *United States* (C.A. D.C.), decided September 12, 1963	5
Jackson v. *United States*, 250 F. 2d 897	5
United States v. *Camp*, 140 F. Supp. 98	7
United States v. *Cascade Linen Supply Corp.*, 160 F. Supp. 565	7
United States v. *Consolidated Laundries Corp.*, 291 F. 2d 563	6-7
United States v. *Hufford*, 103 F. Supp. 859	7
United States v. *Maryland & Virginia Milk Pro. Ass'n.* 90 F. Supp. 681 reversed, 193 F. 2d 907	7
Statutes:	
Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.) Sec. 145(b)	3
Internal Revenue Code of 1954 (26 U.S.C. 1958 ed.) Sec. 7201	3
Miscellaneous:	
Federal Rules of Criminal Procedure, Rule 29	2

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 531

JACK B. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 429-442) are not officially reported. The opinion of the Court of Appeals (Pet. App. 1-9) is reported at 321 F. 2d 274.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1963. (Pet. App. 10-11.) Peti-

tion for rehearing was denied on September 12, 1963. (Pet. App. 12.) The petition for a writ of certiorari was filed on October 9, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced when the district court reserved decision, and subsequently failed to rule, on his motion for a judgment of acquittal made at the close of the government's case in chief.

2. Whether, in a case tried without a jury, the evidence introduced in the government's case in chief should be viewed in the light most favorable to the government for purposes of ruling on a motion for a judgment of acquittal.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Rule 29. MOTION FOR ACQUITTAL

(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not

granted, the defendant may offer evidence without having reserved the right.

* * * * *

STATEMENT

On September 23, 1959, an indictment in two counts was filed against petitioner in the United States District Court for the Southern District of Florida, charging that he had wilfully attempted to evade and defeat his income taxes for the years 1953 and 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954. The indictment alleged that he had reported an income tax liability of $27,712.88 for fiscal year 1953, and $19,775.24 for fiscal year 1954, whereas his correct tax liability for those years was $189,351.86 and $124,196.60, respectively. (R. 1-2.) Petitioner waived a jury and the case was tried to the court. On February 12, 1962, the trial judge entered findings of fact and conclusions of law (R. 429-442), and found petitioner guilty on both counts (R. 441). On April 27, 1962, he imposed concurrent prison sentences of one year on each of the counts, and a fine of $7,500 on each count (R. 492-494). The district court further ordered that petitioner's confinement be limited to three months, and suspended the execution of the remainder of the sentence on condition that petitioner pay the imposed fines (R. 494). The court of appeals affirmed. (Pet. App. 1-9.)

The evidence to support the verdict of guilt is not questioned by petitioner (Pet. 4), and is fully summarized in the opinion of the court of appeals (Pet. App. 2-8).

ARGUMENT

At the close of the government's case, petitioner moved for a judgment of acquittal on the ground that the government had failed to prove guilt beyond a reasonable doubt. (R. 353-354.) The district court declined to hear argument on the motion, informed petitioner's counsel that it would take the motion under advisement, and suggested that petitioner proceed with the case. (R. 353-354.) Petitioner thereupon introduced evidence in his own behalf (R. 355-418) to which the government offered evidence in rebuttal (R. 418-426). At the close of the case, petitioner again moved for a judgment of acquittal, which the court took under advisement. (R. 427.) Several months later the court entered its judgment of guilty (R. 441) without specifically ruling on petitioner's motion for a judgment of acquittal made at the end of the government's direct case.

The court of appeals held that the district court's failure to rule on this motion was harmless error on the facts of this case because, viewing the evidence in the light most favorable to the government, the district court would have had to deny the motion in any event.

1. Rule 29(a) of the Federal Rules of Criminal Procedure (*supra*, p. 2) provides, in pertinent part,

that "The court on motion of a defendant * * * shall order the entry of judgment of acquittal * * * after the evidence on either side is closed if the evidence is insufficient to sustain a conviction * * *." It has been held that this rule makes mandatory the direction of an acquittal where the government's direct case is insufficient to prove guilt, and that a district judge has no discretion to reserve his ruling in expectation that the defendant's evidence will fill "the gap in the Government's" case. *Cephus* v. *United States*, (C.A. D.C.), decided September 12, 1963; cf. *Jackson* v. *United States*, 250 F. 2d 897, 901 (C.A. 5th). We do not here question the validity of this principle, and we assume—as did the court below—that a district court is required to enter a judgment of acquittal at the close of the government's case where the evidence at that point is inadequate to establish guilt. (Pet. App. 6-7.)

In the instant case, however, it is clear that the evidence introduced in the government's main case—when viewed in the light most favorable to the government—was ample to sustain the conviction; and therefore any error in failing to rule on petitioner's motion for acquittal was harmless. Indeed, petitioner makes no effort to demonstrate that the government's direct case was insufficient to prove guilt; nor does he claim that either the defense evidence, or the government's evidence in rebuttal, supplied a link which was otherwise lacking in the government's case.[1] To the contrary, petitioner admits that the

[1] The defense evidence was primarily directed to establishing that the alleged profits made by petitioner on the sale of

government's case in chief established, *inter alia*, that he derived profits of over $500,000 in his transactions with the Dominican Republic, but reported only $61,000 of this amount as income. (Pet. 4.) In short, petitioner was not prejudiced when the district court reserved ruling on his motion since the government proved its case without regard to the evidence which was introduced thereafter and therefore the motion would have had to be denied.[2]

2. Though the point was not raised in the court below, petitioner now suggests (Pet. 10-12) that the court of appeals may have employed an incorrect standard in passing on the sufficiency of the evidence introduced in the government's case in chief. The court of appeals, in accord with the well-established rule in jury cases, viewed the evidence in the light most favorable to the government. (Pet. App. 7.) The only other circuit court decision in point has likewise held that this is the correct standard to be used in a non-jury case. *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563 (C.A. 2d). As was said in that case (p. 574), the applicable standard is "whether * * * [the trial judge] *could*,

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planes to the Dominican Republic actually belonged to a certain group in that country headed by General Rafael Trujillo, Jr.; that petitioner had full authority to make personal use of these funds on a loan basis; and that the funds were so used. (R. 355-384.)

[2] We note that the district court, during petitioner's argument in support of his motion for a new trial, stated that the government had in fact sufficiently proved guilt in its main case. (R. 474.)

not whether he *would*, find the accused guilty on the Government's evidence." (Emphasis in original) With a single exception, the district courts have been in accord with these holdings.[3]

Since there is no conflict among the courts of appeals and, indeed, near unanimity in the federal courts on this point, we submit that there is no occasion for further review. This is especially clear in light of the extreme burdens that would be imposed upon the trial judge and the disorder that would result at trial if the district court were required to take the time to consider and determine all questions of credibility and to decide exactly what inferences were to be drawn from the evidence in the midst of the trial on a partial record as well as at the conclusion of the trial on a full record. To hold a judge to such a standard—especially in a long trial containing a large number of exhibits—"would, at the very least, severely impair the orderly disposition of the issues" in the case. *United States* v. *Cascade Linen Supply Corp.*, *supra*, p. 567.

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[3] *United States* v. *Cascade Linen Supply Corp.*, 160 F. Supp. 565 (S.D. N.Y.), reversed on other grounds *sub nom. United States* v. *Consolidated Laundries Corp.*, *supra*; *United States* v. *Maryland & Virginia Milk Prod. Ass'n*, 90 F. Supp. 681, 684 (D.C.D.C.), reversed on other grounds, 193 F. 2d 907 (C.A.D.C.); *United States* v. *Hufford*, 103 F. Supp. 859, 860 (M.D. Pa.). To our knowledge, the only case that has come to a contrary conclusion is *United States* v. *Camp*, 140 F. Supp. 98, 99 (D.C. Hawaii).

CONCLUSION

Further review by this Court is unwarranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER, 1963.